

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-4223

416

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

CASE NO. 75-4223
75-4243

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

HENRY BOOK, et al., d/b/a
SPRAIN BROOK MANOR

Respondent

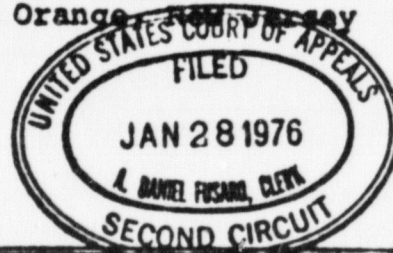
CROSS PETITION

FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
SPRAIN BROOK MANOR

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STATEMENT OF ISSUE PRESENTED

Whether the Board should have accepted the certification of the arbitrator that Local 999 did in fact represent a majority of employees in an appropriate unit at Sprain Brook Manor.

COUNTER STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board (hereinafter, the Board) pursuant to Section 10(e) of the National Labor Relations Act, as amended, for enforcement of its Order and by the cross petition for review of the Board's Order by Henry Book, et al., d/b/a Sprain Brook Manor pursuant to Section 10(f) of the National Labor Relations Act, as amended.

COUNTER STATEMENT OF THE FACTS

In mid-February 1974 Anthony DeFranco and his associate, Mr. Yanucci, business representatives of Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (hereinafter, Local 999) commenced an organizational drive of the employees of Sprain Brook Manor (hereinafter, Sprain Brook) (A. 79-80). At that time, the employees

were not represented by any labor organization, and there was no other labor organization attempting to organize the employees (A. 83-85).

Local 999, experienced in representing employees of nursing homes, was present at Sprain Brook Manor on a number of occasions to gather support (A. 82-83). They arrived early in the morning and spent the days handing out cards and explaining the benefits and services they could provide to the employees (A. 74, 91, 105). On one occasion they saw between 25 and 30 employees (A. 88). They were given 12 signed representation cards back that day by a female employee who advised them that more cards would be returned to them through the mail (A. 88). On another occasion, they talked with another 10 employees, receiving back additional signed cards (A. 89). They left word with the employees that the cards could be returned by mail (A. 94).

As a result of this organizational drive, Local 999 was able to obtain signed representation cards from a majority of the employees of the Respondent-employer. The union, thereafter made a demand upon the employer for recognition. As a result of said demand, both parties agreed to have Joseph F. Wildebush, Esquire, a renowned arbitrator, check the signatures on the cards against the employees W-4 forms to determine whether the signatures were authentic and, whether,

in fact, the union represented a majority of the employees. On February 20, 1974 Mr. Wildebush conducted the card check as described above and, after discarding five cards for lack of signatures, certified that Local 999 did represent a majority of the Respondent's employees. It was found that the union had valid representation cards from 55 of the 101 employees said to constitute the appropriate unit. This unit was later reduced to 77 on February 22, 1974 when the collective bargaining agreement was executed (A. 46).

After Local 999 had completed its organizational drive, validly obtained majority status and executed its collective bargaining agreement, a Complaint was issued by the Board in May 1974 against the employer based on a charge filed by Local 1199, Drug and Hospital Union RWDSU, AFL-CIO (hereinafter, Local 1199) alleging that Local 999 and Respondent executed and maintained a collective bargaining agreement when Local 999 did not represent a majority of the employees in the unit. Such conduct on the part of the Respondent was asserted to be violative of Sections 8(a)(1) and (2) of the Act.

A hearing was held on various dates between September 11, 1974 and October 29, 1974 before the Honorable Melvin J. Welles.^{1/} The proofs detailed the organizational drive of

^{1/} Judge Welles took over the case after two days of the hearing when Judge Nachman became unavailable.

Local 999 as described above as well as the card checking process engaged in by Arbitrator Wildebush. No proof of any taint or irregularity in the card checking procedure was advanced or proven by General Counsel. Rather, General Counsel's entire case was based on the testimony of ^{2/}25 employees who, despite the authentication of the signatures on the 55 cards by Wildebush, stated that they never signed cards for Local 999.

Based on the evidence described above, Judge Welles issued his decision dismissing the complaint filed by General Counsel and dismissing the charges that the Respondent-employer violated Sections 8(a)(1) and (2) of the Act by recognizing Local 999 and entering into a collective bargaining agreement with that union. Exceptions were filed and the Board, on July 30, 1975, modified this decision. It found that Local 999 did not represent a majority of Sprain Brook's employees despite the certification of Wildebush, and that therefore the employer did recognize and enter into a collective bargaining agreement with a minority union in violation of not only Sections 8(a)(1) and (2) of the Act, but Section 8(a)(3) as well (in view of the union security clause contained in the

^{2/} It was stipulated that another 45 employees would offer the same testimony elicited from the 25 employee witnesses called.

aforementioned collective bargaining agreement). An appropriate Order was then issued by the Board which provided, among other things, that the Respondent-employer cease and desist from recognizing Local 999 and giving effect to the collective bargaining agreement dated February 22, 1974. This brief is in support of the Respondent's petition for review of that Order.

POINT I

SUBSTANTIAL EVIDENCE PRESENT IN THE RECORD AS A WHOLE CONCLUSIVELY DEMONSTRATES THAT THE BOARD SHOULD HAVE ACCEPTED THE CERTIFICATION OF THE ARBITRATOR THAT LOCAL 999 DID IN FACT REPRESENT A MAJORITY OF EMPLOYEES IN AN APPROPRIATE UNIT AT SPRAIN BROOK MANOR. ACCORDINGLY, THE BOARD'S FINDING THAT THE EMPLOYER VIOLATED SECTIONS 8(a)(1)(2) and (3) OF THE ACT BY AFFORDING RECOGNITION IS IN ERROR.

It is well settled under the Labor Management Relations Act that an employer has the duty to recognize and bargain collectively with that labor organization which represents the majority of its employees. NLRB V. W.T. GRANT CO. 199 F2d 711 (9th cir 1954). Moreover, it has been conclusively determined that such majority status may be proven by resort to an authorization card count verified by an arbitrator or impartial third party. JOY SILK MILLS, INC. V. NLRB 185 F2d 732 (D.C. Circuit 1950). Thus an employer's denial of recognition to a union who has obtained signed authorization cards from a majority of employees (and verified same through an arbitrator) violates Section 8(a)(5) of the Act. / NLRB V. GISSEL PACKING CO. 395 US 575 (1969).

Widespread acceptance of such a policy is based in part on judicial belief that authorization cards which clearly set forth their purpose may be more indicative of the employees true wishes in many instances than a Board certified election. NLRB V. GISSEL PACKING CO., supra. Such acceptance is also

based to a large degree on judicial confidence in the ability of arbitrators and impartial third parties to resolve the issues presented to them in a manner consistent with fairness and the Act. CAREY V. WESTINGHOUSE ELECTRIC CORP. 375 US 261 (1964).

The satisfaction, deference and encouragement given to arbitration decisions and certifications is thus well established. Although the Board clearly has the jurisdiction to determine issues initially resolved by the arbitration process, deference to the arbitration decision is the general rule and not the exception. TIME D.C. INC. V. NLRB 504 F2d 294 (C.A. 5, 1974). The line of federal cases extending from SPIELBERG MANUFACTURING CO. 112 NLRB 1080 (1955) through RAMSEY V. NLRB 327 F2d 784 (C.A. 7, 1964) to TIME D.C. INC. V. NLRB, supra, all consistently hold that where the proceedings appear to have been fair and regular, untainted by fraud, collusion, serious procedural irregularities or repugnant to the purposes of the Act, the Board should defer to the arbitration decision. So long as certain minimum standards of regularity and due process are observed, the Board and the Courts have felt that the use of impartial third parties represents an excellent manner by which to facilitate the prompt and expert settlement of labor disputes. COLLYER V. INSULATED WIRE 192 NLRB No. 150.

Thus it is clear that the function of the Board when faced with a challenge to an arbitration decision or certification is not to embark on a credibility hearing, pitting the belated proofs of General Counsel against the arbitration award. Such a process is futile and incapable of resolving the problem since oftentimes neither side's position can be effectively cross-examined. Generally it leads only to a decision based on speculation.

The correct path which must be followed in such circumstances is to first review the arbitration decision or certification to ascertain if it was arrived at in a fair and equitable manner, untainted by fraud, collusion or other irregularities. RAMSEY VS. NLRB, supra. Only as the proofs of General Counsel have a bearing on these issues should they be considered by the Board in making its decision: whether to defer to the arbitrator's resolution. In no event should the Board commence a new plenary hearing with the proofs of General Counsel pitted against the arbitration award and the outcome decided on the basis of credibility unless such taint can be shown.

In this regard, there is a presumption of fairness and regularity that accompanies an arbitration decision which General Counsel must overcome. Such an approach to reviewing decisions of fact finding bodies is consistent with that which

exists throughout our judicial process. A rehearing of factual disputes cannot be had as a matter of course. Satisfactory proof that the initial decision was rendered in an unfair, fraudulent or irregular manner must first be presented. Indeed the SPIELBERG, RAMSEY and TIME opinions state that such "taint" in the arbitration process must be clearly shown, thus indicating that the burden of proof must be satisfied by clear and convincing evidence. Without this approach in considering and reviewing the decision of fact finders, there would be no finality in the resolution of disputes.

Thus it is clear that the Board in the case at bar should have deferred to the arbitrator's certification of majority status to Local 999, absent clear and convincing proof of facts showing fraud, irregularity or a lack of fairness in the card checking process. ~~Challenges~~ Challenges to an arbitrator's representation card check decision have long been rejected where they are merely presented to obtain "a second chance" and are based on belated superficially raised credibility questions and not on proof of irregularity. NLRB *Rep. Election* *Where E* *had to* *check* *the* *books*
V. TOWER CO. 329 US 324 (1946). Thus in NLRB V. C & C PACKING
CO. 405 F2d 935 (C.A. 9, 1969), the 9th Circuit held that the employer's challenge to the mediator's finding of majority status of a union was without merit since it was obviously

*EWAS really estopped 300
30 Challenges*

based on the company's unhappiness with the decision and not on the manner by which that decision was arrived at. A similar decision was reached in SNOW & SONS 134 NLRB 709 (1961) where the Board held that the employer was bound by the results of a card check conducted by a clergyman which demonstrated a union's majority status. Implicit in the aforementioned three cases is the understanding that credibility questions of majority status will not be considered where there has been no showing of fraud or irregularity in the arbitration process. The rationalization may well be that in the absence of such taint, there is no reason to believe that the arbitrator's finding of majority status was not credible.

Those cases in which the Board refused to defer to the arbitration award or the parties resolution of the representation question are quite distinct from the situations outlined above and the case at bar. They were based on clear and obvious irregularities and injustices in the card checking process. In ILGWU V. NLRB 366 US 731 (1961), the Court did not accept the employer's recognition of the union because it was based solely on the latter's allegation of majority status unverified by any independent card check. Likewise, the Board rejected the unions majority status in ELLERY PRODUCTS MANUFACTURING CO., INC. 149 NLRB 1388 (1964) since

*matter there
was a
card check
which
states
election
306 US 173*

recognition was based solely on the union's threat of a strike if their unproven assertion of majority status was not accepted. In HUNTER OUTDOOR PRODUCTS 176 NLRB 449 (1969), the Board refused to defer to the arbitrator's finding of majority status because of proof that the cards were tainted as well as proof that a second union was actively organizing the employees at the time of the card check. This latter factor was also the reason the Board did not defer to the arbitrator's finding in HI-TEMP 203 NLRB No. 119 (1973). Essentially the Boards and the Courts overturned the union's majority status in these cases either because no card verification process existed at all or because of proof of another union's presence. Neither factor exists in the case at bar (See Point III of the Brief).

Another major grouping of cases where deference to the arbitrator's award was not given concerns the injustice inherent in a proceeding where the challenging party's interests are not meaningfully presented to the arbitrator. This situation also is unlike the one in the case at bar (as will be discussed hereinafter). Thus, fired employees who have incurred the wrath of both employer and their labor representative cannot be said to have had meaningful access to the arbitration process when the only parties present at such a forum

are those hostile to them KANSAS MEAT PACKERS 198 NLRB No. 2 (1972). See also NLRB V. HORN AND HARDART CO. 439 F2d 674 (C.A. 2, 1971) where cashiers who wished to break off from the existing union and form their own unit were found to have had no real representation at the arbitration hearing deciding the issue. Interesting to note in cases of this nature is the fact that the proof required to show lack of real representation was clear and convincing. UNITED STEELWORKERS V. WARRIOR & G. NAV. CO. 363 US 1409 (1960). Equally important, however, was the understanding that it was the lack of minimum due process safeguards which was the basis for refusing to defer to the arbitrator's award.

In attempting to relate this latter group of cases to the case at bar, General Counsel and the charging union have apparently suppressed the obvious fact that it was the employees who gave the impetus to Local 999 to press for recognition by signing the authorization cards to begin with. It was clearly resolved in NLRB V. GISSEL PACKING CO., supra, that the employees intentions can be found to have been expressed by their signing of unambiguous cards which state their desire for representation. Thus rather than lacking real representation at the card checking process, they obviously possessed it by having the union they signed up for (Local 999) press for recognition. Once again General

Counsel seeks to confuse the issue by pitting the verbal testimony of the employees given seven months later against the majority status found by Arbitrator Wildebush. It is not the opinions of the employees expressed months later, which would be critical, but rather the intentions of the employees at the time of the card check as demonstrated by their signing cards for Local 999.

The Law then with respect to Board deference to arbitration decisions and certifications is clear. It will not embark on a new credibility hearing pitting the new evidence obtained against the arbitrator's certification of majority status. Rather, deference is required to be given unless General Counsel can show by clear and convincing proof that the arbitrator's card checking process was tainted by fraud, irregularity or an absence of fairness. A rehearing of the issue of majority status cannot be had unless General Counsel can submit the type of proof sufficient to taint the arbitration process so as to render its findings incredible.

There has been absolutely no evidence presented to indicate that Arbitrator Wildebush conducted his card check in a manner that was not regular, fair, free of taint, and consistent with the normal safeguards. There is a total absence of proof of fraud or injustice. Indeed five cards

were rejected by Wildebush because they either bore no signature or the names found thereon were printed rather than signed.

In point of fact, the proofs surrounding the card checking process were so free of contradiction or question as to be admitted by stipulation of the parties at the hearing. They show that after obtaining representation cards from a majority of the employees, Local 999 made a demand for recognition as a result of which both sides agreed to have an impartial third party check the signatures on the cards against the employee's W-4 forms to determine the authenticity of the signatures and the union's majority status. The parties consented to the appointment of Joseph F. Wildebush, Esquire, a renowned arbitrator whose reputation has long been established as unimpeachable in the labor field. On February 20, 1974, Mr. Wildebush compared the signatures on the authorization cards to the employee W-4 forms and, after rejecting five cards as aforementioned, found that 55 employees out of a proposed unit of 101 (later reduced to 77) had signed cards for the union. He then certified that Local 999 did in fact represent the majority of the employees.

The proofs surrounding the arbitrator's card checking process were totally free of taint. Yet despite this fact and the clear enunciation of the law in this regard, General Counsel asserts that no deference should be given to this

certification because of the belated testimony of 25 employees that they never signed cards for Local 999. General Counsel seeks to raise a credibility issue on the basis of this testimony without offering any proof as to what factors in the card checking process would render that certification incredible. Only if such proof were available would the element of substantiation necessary to add validity to General Counsel's position exist. In its absence, General Counsel's offer of proof demonstrates nothing more than an unreasonable attempt to get "a second chance" by presenting one piece of evidence which cannot be refuted against a second piece of evidence (the arbitrator's certification) which had been properly accepted as valid.

To permit the issue of majority status to be reopened and resolved in this fashion would be contrary to both the Act and the general principals of fair play and due process inherent in our system of jurisprudence. There would be no finality to any fact finding decision. Superficial issues of credibility standing in direct opposition to one another could be raised at any stage of the judicial process. Moreover, any labor organization could wait in the wings until the employees became disenchanted with a particular existing union, sell them a better bill of goods and then raise the issue of majority status despite an arbitrator's

certification and the existence of a collective bargaining agreement.

Such a turn of events has never been accepted nor would it be tolerated by our Courts. Thus, the very nature of our judicial process requires that deference be given to decisions of fact finding bodies absent a clear showing of irregularity which would preclude the exercise of fairness and justice. It is only proof of taint found in the arbitrator's card check which could lay the basis for a refusal to honor his certification of majority status. Where, as here, the proofs clearly demonstrate the fairness and regularity of the card check, deference must be given to Arbitrator Wildebush's certification despite the credibility issue of majority status belatedly raised by employees who may have become infatuated with a new union at a later date. Under these circumstances, Sprain Brook's recognition of Local 999 and the execution of a collective bargaining agreement with them do not violate Sections 8(a)(1)(2) and (3) of the Act.

POINT II

THE BOARD ERRED IN FINDING THAT GENERAL COUNSEL SATISFIED ITS BURDEN OF PROOF THAT THE EMPLOYER VIOLATED SECTIONS 8(a)(1)(2) AND (3) OF THE ACT BY RECOGNIZING AND BARGAINING WITH A MINORITY UNION.

It is the employer's basic position that the Board should have accepted the arbitrator's certification of majority status since there was no proof of irregularity, fraud or taint in the card checking process. The employer asserts that the testimony of the employees offered by General Counsel was insufficient to show a lack of majority status since it bore little relevance to the issue of the regularity and fairness of the card checking process. Nevertheless, in view of the Board's decision that the testimony of the employee witnesses did make a reconsideration of Local 999's majority status proper, the employer now argues, in the alternative, that General Counsel's prima facie case was overcome by proof of Arbitrator Wildebush's card check and that, accordingly, General Counsel's burden of proof was not satisfied.

As was stated by Judge Welles (and we agree) the weighing of the employees' testimony against the arbitrator's card check does not lend itself easily to credibility resolution. (A. 8 to 14). Efforts at discrediting each side's proofs are thus reduced to arguments of speculation and equitable considerations. Nevertheless, even on this basis, logic and the

equities clearly preponderate in favor of the credibility of the card check over the employees' belated testimony. This was the conclusion of the two dissenting members of the Board (A. 27-30).

Much of General Counsel's brief falls within this realm of speculation and ill-founded equities. To support its position, it argues that Local 999 would not have majority status if 14 of the 24 employees excluded from the final unit of 77 were among the 55 authenticated card signers for Local 999 (Brief, page 10). This is of course total speculation and hardly a proper basis for determining credibility. Moreover, 9 of those 24 testified that they were not among the 55 signers (A. 29). The important factor is that it is clear that both sides can engage in numerical speculation to support its position, but such an exercise does little to resolve the credibility question.

General Counsel next argues that the equities fall against Sprain Brook and the union since the former could have eliminated the problem by demanding an election and the latter could have eliminated the problem by saving the cards. To discredit the card check on this basis is totally contrary to the law. At present there is no law which requires unions to retain the representation cards beyond the card check. Indeed, the very purpose of the arbitrator's certification is to

establish majority status and eliminate the need for the cards. Furthermore, according to NLRB V. GISSEL PACKING CO., supra, the employer was required to recognize Local 999 after the card check, absent any basis for challenging the certification at that time. The alternative for the employer would be to risk an 8(a)(5) violation. General Counsel's last argument in support of discrediting the card check is its assertion that the employees were not really represented at the card check. This argument was dealt with in Point I of this Brief.

Thus much if not all of General Counsel's speculation and equitable arguments against crediting the card check are certification without merit. Contrariwise, there is strong reasoning available to discredit the employees' testimony and credit the certification. Most importantly, by stipulation, the circumstances surrounding the card check of Arbitrator Wildebush remains uncontradicted on the record.

Secondly, the testimony of the employees and Anthony DeFranco, the business representative for Local 999, paint a clear picture of the union's organization activities which would be totally consistent with a finding that the majority of the employees signed representation cards in support of the union. DeFranco stated that the union represented a number of other nursing homes and was familiar with the interests of its employees. He related that he and Mr.

Yanucci (another union representative) stopped at Sprain Brook Manor on three occasions in mid-February of 1974. On the second occasion he met between 25 and 30 employees as he was passing out cards to the employees entering the home. (A. 86-88). Later that day, a female employee met him outside and gave him 12 signed cards. She indicated that other cards would be returned to the union through the mail (A. 88). On the third occasion he met another 10 employees and received more cards back (A. 89). Ultimately, he received the bulk of the cards back through the mail (A. 30).

His testimony is corroborated by many of the employee witnesses called by General Counsel. Olga Verga related her awareness of Local 999's organizational drive in February 1974 (A. 52). Willie Mae Shore recalled Local 999 literature being passed out (A. 70). Regina DeGhetto related that she saw Local 999 representatives handing out cards (A. 74). Angel Pital recalled talking to these representatives in February 1974 and telling them it was "o.k." for them to represent her (A. 105). Joan Enea stated she specifically remembers DeFranco and Yanucci passing out cards and asking that they be returned by mail (A. 91-94). Elizabeth Andson was so concerned about Local 999's drive in February 1974 that she proceeded to advise Local 1199 of that fact (A. 101-104).

Thus the organizational drive of Local 999 was well

known and according to some, well received. Under such circumstances, it is perfectly believable that by February 20, 1974, Local 999 was ready to demand recognition. More importantly, it would be perfectly reasonable to hear that a card check had resulted in finding that the union had authenticated cards signed by 55 employees. The testimony concerning the organizational drive through the stipulation concerning the card check reasonably and consistently demonstrate the likelihood of Local 999's majority status. Thus there is no reason to doubt Arbitrator Wildebush's finding that the signatures on 55 of the cards compared favorably to the W-4 forms given to him.

The testimony of the employee witnesses, however, does not hold up so well. Indeed, Emily Warren admitted that she lied about not being aware of Local 999's presence. On cross examination she admitted that the union was indeed involved in an organizational drive at Sprain Brook Manor in February 1974 (A. 73).

The case at bar would seem to illustrate a classic example of employees who may have become disenchanted with the labor organization that they initially chose to represent them as a result of pressure exerted on them at a later date by a second union claiming to offer superior benefits. Indeed, it is the Court's awareness that employees may later change

their minds which resulted in the U.S. Supreme Court dictum in NLRB V. GISSEL PACKING CO., supra, which precluded the Board from inquiring into the subjective motivations behind the signing of representation cards by the employees. (See pages 607-608 of that decision).

In conclusion when forced to decide between a card check on the one hand and belated testimony on the other asserting that no cards were signed, logic and common experience would seemingly dictate that it is more likely that the employees may have changed their minds than that a respected arbitrator may have erred 55 times in comparing signatures. Once again it is the absence of irregularity or fraud surrounding the card check, the strong evidence of Local 999's organizational activities and the fact that employees may have been pressured into changing their minds which militates against a finding that General Counsel has satisfied its burden of proof.

POINT III

THERE IS NO EVIDENCE IN THE RECORD BELOW TO SUPPORT ANY PROPOSITION THAT LOCAL 1199 WAS INVOLVED IN ANY ORGANIZATIONAL ACTIVITIES AT SPRAIN BROOK IN FEBRUARY 1974 WHEN LOCAL 999 MADE ITS DEMAND FOR RECOGNITION.

Throughout the development of the case, there has been an undercurrent of talk that Local 1199 was present during Local 999's organizational drive and demand for recognition. At various times both Local 1199 and General Counsel have raised the inference that a contest between the two unions for the employees support was waged, and that Local 1199 was not only conducting an organizational campaign, but that they had secured representation cards from certain employees. To be sure, it is well accepted that an arbitrator's certification of majority status need not be honored in a situation where two rival unions are competing for employee support. ALLIED SUPERMARKETS, INC. 169 NLRB 927, ITALCO ALUMINUM CORP. 169 NLRB 1034. However, the facts of the case at bar make it abundantly clear that no such contest between two rival unions existed here.

Although there had been an effort by General Counsel at the outset to prove Local 1199's presence, such testimony had by stipulation been withdrawn and the matter proceeded solely on the issue of Local 999's majority status at the time it was recognized by the employer as the bargain-

ing representative. Thus, there was no evidence whatsoever in the record demonstrating Local 1199's presence. The entire record concerned itself only with Local 999's organizational drive and majority status. The following excerpt from the dialogue surrounding the stipulation should lay this issue to rest once and for all:

JUDGE WELLES: "My understanding would be that up to this point at least it looked as if Mr. Portnoy was trying to show by the signing of 1199 cards, activities of 1199, that there was some sort of organizational activity going on apace with that of 999 and therefore you have a conflict.

Now by deleting all those references, I take it you are no longer relying on any such theory. Your sole theory at this point is that 999 did not have a majority and that is all you intend to show, not by the fact that they signed cards for 1199 and with no reference to the fact that 1199 was even on the scene so for the purposes of this case, correct me if I am wrong, it is as if 1199 never existed as far as your theory is concerned. Is that correct?"

MR. PORTNOY (for General Counsel): "That's correct, your Honor . . ."

Under the circumstances outlined above, no acceptable argument can be made that the arbitrator's certification of majority status was invalid because of the presence of Local 1199.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's Order should not be enforced and the Complaint dismissed.

Respectfully submitted,

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NATIONAL LABOR RELATIONS BOARD

Petitioner

vs.

HENRY BOOK, et al., d/b/a
SPRAIN BROOK MANOR

Respondent

: United States Court of Appeals Court
: for the Second Circuit Division
: Case ~~XXXXXX~~ Docket # 75-4223
: 75-4243

: CROSS PETITION

: FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR
: RELATIONS BOARD

: Sat Below:
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:
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CERTIFICATION

On January 23, 1976, I, the undersigned, being of full age did deliver to Lawyers Service or mail by regular mail for service on: the Clerk of the United States Court of Appeals, Foley Square, New York, New York 10017 and: Elliott Moore, National Labor Relations Board, Office of the General Counsel, Washington, D. C.; Sipser, Veinstock, Harper and Dorn, Attorneys for Intervenor, Local 1199, 280 Madison Avenue, New York, New York 10017; Cramer, Brennen and Nelson, Attorneys for Local 999, 1143 East Jersey Street, Elizabeth, New Jersey 07201

4 copies of Brief for Sprain Brook Manor to the Clerk of the United States Court Appeals for the Second Circuit and 2 copies of the same to each of the following: Elliott Moore; Sipser, Veinstock, Harper and Dorn; and Cramer, Brennen and Nelson

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: January 23, 1976

Richard A. Bogart
/s/ Richard A. Bogart